

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION**

Jonathan R., minor by Next Friend Sarah DIXON, <i>et al.</i>,)	
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)	
)	
<i>Plaintiffs,</i>)	Case No. 3:19-cv-00710
v.)	
)	
Jim JUSTICE, in his official capacity as the Governor of West Virginia, <i>et al.</i>,)	
)	
<i>Defendants.</i>)	

**PLAINTIFFS’ NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF THEIR
MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF CLASS COUNSEL**

Plaintiffs respectfully submit this notice of supplemental authority in support of their Motion for Class Certification and Appointment of Class Counsel. (*See* ECF 130.) On August 17, 2022, the United States District Court for the District of Oregon granted class action status to a lawsuit that, like this one, asserts constitutional and federal statutory claims against the state’s child welfare agency on behalf of all foster children who are or who will be in its custody. *Wyatt B. v. Brown*, No. 6:19-cv-00556 (AA), 2022 U.S. Dist. LEXIS 147091 (D. Or. Aug. 17, 2022) (attached as Exhibit A). In addition to certifying a “General Class” of foster children, the Oregon district court certified all three proposed subclasses, including an “ADA Subclass” consisting of foster children with disabilities.

Notably, the Oregon district court dismissed defendants’ assertions that plaintiffs had not demonstrated that defendants acted with “deliberate indifference” and that the state had “been actively working to improve the conditions for children in care.” *Id.* at *76-77. The district court held that “Defendants’ argument conflates the requirements of commonality and typicality with a ‘mini-trial’ on the merits . . . and that district courts err if they deny class certification based on a

premature assessment of the merits of the case.” *Id.* at *77. The court also declined to exclude expert reports “detailing common DHS policy and practice failures based on a review of the Named Plaintiffs’ case files.” *Id.* at *78.

The district court found that plaintiffs satisfied Rule 23’s typicality and commonality requirements and that typicality “does not require . . . that Named Plaintiffs be factually identical to the absent members of the class or that they be . . . statistically representative of the proposed class.” *Id.* at *95. Moreover, the district court found that the risk of harm—not actual harm—was determinative of typicality. *Id.* Thus, the district court certified a class of foster children where plaintiffs “demonstrated that the challenged policies and practices exist and that they expose children in foster care to harm.” *Id.* at *97.

Last, in finding that plaintiffs met the Rule 23(b)(2) requirements, the district court dismissed defendants’ argument that in terms of requested relief, plaintiffs were “in effect seeking thousands of individualized determinations,” finding that plaintiffs were “instead challenging Defendants’ systemic failure” and “seek to remedy that failure through class-wide injunctive relief.” *Id.* at *101.

Plaintiffs respectfully request that the Court consider this Supplemental Authority when rendering its decision regarding Plaintiffs’ Motion for Class Certification and Appointment of Class Counsel.

Dated: September 6, 2022

Respectfully submitted,

/s/ Marcia Robinson Lowry

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CERTIFICATE OF SERVICE

I, J. Alexander Meade, counsel for Jonathan R., *et al.*, do hereby certify that on this 6th day of September, 2022, I electronically filed the attached ***“Plaintiffs’ Notice of Supplemental Authority in Support of Their Motion for Class Certification and Appointment of Class Counsel”*** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following counsel of record:

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